

SRC APPROVED

Date March 19, 2014
SLM

State Records Committee Meeting

Division of Archives
Courtyard Meeting Room
February 13, 2014
Salt Lake City, Utah

Members Present: Marie Cornwall, Citizen Representative
Lex Hemphill, Chair, Media Representative
Doug Misner, History Designee
Holly Richardson, Citizen Representative
Ernest Rowley, Elected Official Representative
Patricia Smith-Mansfield, Governor's Designee

Legal Counsel: Paul Tonks, Attorney General's Office
Chiarina Bautista, Attorney General's Office

Executive Secretary: Susan Mumford, Utah State Archives

Others Attending: Susan Barnum, Assistant Attorney General's Office
Rosemary Cundiff, Archives Staff
Dan Harrie, *The Salt Lake Tribune*, petitioner
Bruce Johnson, Utah State Tax Commission
Lorianne Ouderkirk, Archives staff
Rebekkah Shaw, Archives staff
Renee Wilson, Archives staff

Hearing – Lee Davidson, *The Salt Lake Tribune* vs. Utah State Tax Commission

Mr. Hemphill welcomed the parties for the hearing at 9:05 a.m. and explained the procedures. Mr. Dan Harrie said he was replacing Lee Davidson in representing *The Salt Lake Tribune* as the petitioner. Ms. Susan Barnum of the Attorney General's Office represented the Utah State Tax Commission. Bruce Johnson, Chairman of the Tax Commission, introduced himself.

Opening – petitioner

Mr. Harrie said *The Tribune* had requested information last October when the Internal Revenue Service (IRS) decided to allow joint filing of income taxes by same sex couples married legally in any state. *The Tribune* wanted to know what the State of Utah was doing in the wake of that decision. At the time it seemed that the state would follow suit because of the intertwining of the federal and state systems. When you fill out tax forms, you use federal tax forms to file state taxes. Senator Curtis S. Bramble, a CPA who has

been involved with the tax and revenue committees of the state legislature, seemed to indicate that the state would follow the federal policy. A short while later, the official policy of the state was that the state would not accept the filing of same sex couples married legally in other states. This policy was issued by the state in the form of a notice. In an interview Mr. Johnson said it was largely driven by advice from Attorney General's Office. Some written communications exist which have been withheld under the attorney-client privilege. The records request was based on the idea that public policy is best established through open debate. *The Tribune* is asking the committee to review the documents to see if they should be protected and to weigh the public interest in favor of access to the records.

Opening – respondent

The records at issue are protected by the attorney-client privilege. The Tax Commission's interest in maintaining its attorney-client privilege outweighs any public policy interest in the records. The Tax Commission received the records request. It specifically asked for letters, emails, memos, records of phone calls, or other communications from or to the commission and/or its staff from outside parties regarding the development of its policy about whether same sex couples married in other states could file joint returns in Utah. There were email records responsive to the requests. Mr. Davidson was given some records and some were withheld pursuant to attorney client privilege under Utah Code 63G-2-305(17). There was a question whether the records met the definition of attorney-client privilege since they were communications between Tax Commissioner Johnson and legal counsel for the governor's cabinet. Commissioner Johnson sits on the governor's cabinet and the governor's attorney acts as counsel for the governor. Some of the documents were written by an attorney in the Attorney General's Office and some were protected under Utah Code 63G-2-305(18) with the claim of anticipation of litigation.

Testimony – petitioner

Mr. Harrie said *The Tribune* request was for the committee to review the records to determine whether they are public or protected. If they are protected, then weigh the public interest to determine whether they should be released. There was no recorded vote of the Tax Commission and no open forum that formed the basis of the decision. The entire decision was made on the advice from the Attorney General's Office. The policy was reversed with Judge Robert J. Shelby's ruling and filing for same sex couples was accepted. The reversal was announced with no discussion in open forum. A number of couples were married within the state of Utah in the 18 days during which same-sex marriages were performed in Utah. The decision now in effect accepts same sex married couples residing in Utah and joint filing even when they are married in another state. The change in the leadership of the Attorney General's Office may have caused the change in legal advice. In some of the documents released, there is a mention of a Republican Governors conference call. Advice was exchanged about how to proceed in the wake of the Internal Revenue Service decision. *The Tribune* wonders how the documents withheld would shed light on political considerations. While the Tax Commission's representative says that attorney-client privilege outweighs all other interests, the State Records Committee has the responsibility to weigh that. Utah Code 63G-2-301(2)(h) defines

public records as correspondence which documents the rights of the public or any person or public policy dealing with the rights of individuals. The Tax Commission and the State Board of Education are both constitutionally created. The governor can remove any cabinet member. In the Tax Commission, the governor can remove an individual only for cause. Utah Code 59-1-201 contains the definition of the Tax Commission. Any commissioner may be removed by the governor for cause. The governor's counsel, in advising the Tax Commission, would not have the same attorney-client relationship as in advising the Governor's Council. The commissioners enjoy an independence from the political leader that appointed them. The records disclosed by the Tax Commission included seven records. The AG's Office was copied on some of the correspondence. There were email exchanges with the Republican Governors Association and the state, emails to the governor's spokesperson, a blast email from the Republican Governors Association, and an email from the chief of staff of the Republican Governors Association encouraging Mr. Johnson to participate in the conference call. These records don't give a basis for the policy decision that was made. The communications between the Attorney General's Office and the Tax Commission represent the records that were the sole basis for the formation of the public policy. Those are the records that are being withheld.

Testimony – respondent

Ms. Barnum introduced Commissioner Bruce Johnson, Chair of the Tax Commission. Mr. Johnson said that when the decision came from the Internal Revenue Service (IRS) that would allow joint filing for same sex couples, and in the absence of a Utah statute, Mr. Harrie called and asked a hypothetical question. He asked if the Tax Commission would follow federal law. But the constitutional amendment, The Defense of Marriage Act in Utah, had the force of making the decision. He was asked if he had a memo on the phone conversations on the topic, Mr. Johnson did not originally remember a memo that was hand-delivered by John McCarry formalizing their conversations and summarizing the advice. But since the memo was protected by the attorney-client privilege, Mr. Harrie was not given a copy. Other states made similar decisions in their responsibility to administer the law. The decision was the Tax Commission's to make. Director Barry Conover is responsible for Tax Commission decisions. No one commissioner hears all appeals. Mr. Johnson said he had practiced tax law for seventeen years. The Tax Commission received the benefit of the Attorney General's advice. Protection was being claimed for only direct communications with the Attorney General's Office and not for those on which the Attorney General's Office was copied. The original policy decision was made and then the subsequent decision in consultation with the Governor's Office. After Judge Shelby's decision invalidating Amendment 3, the status of the same sex marriages was valid, so Mr. Conover was prompted to issue a notice corresponding to that. Joint returns in Utah are filed by a husband and a wife. Rulemaking and formal legislation is done in public meetings, but an administrative decision and constitutional amendment was at issue and the notices were based on constitutional law and the AG's advice. Mr. Pierce represents members of the Governor's cabinet in the course of his duties. The notices released in October and January set forth the reasons for the notices. The October release noted that Utah does not recognize same sex marriage. After Judge Shelby's decision, the decision was reversed. Change in policy enhanced public interest.

The new policy was in place in January but public interest in revoked policy is less than in a current policy. Ms. Barnum said that the attorney-client privilege exists outside of GRAMA so that people can get advice. Nothing about the case warrants the waiving of that interest. Release of the records would have a chilling effect on conferring in the future with an attorney or putting anything in writing. The threat of litigation on the issue is real no matter what the decision about release of the records.

Closing -- petitioner

Mr. Harrie said that when you don't put things in writing, it can lead to misunderstanding. This was the first time he had heard that Barry Conover had made the decision about the notice instead of Mr. Johnson. There should probably have been an open hearing so that the decision could be made in an open way. It was a decision made without the public knowing anything that went into it. The Commission has the power to administer tax law. The public has a very strong interest in knowing how policy is formed. The public is served by open debate and discussion. Sound and rational decisions can be made by public officials even if they disagree.

Closing -- respondent

Ms. Barnum said that current policy allows same sex couples to file joint tax returns. The October notice was based on the fact that Utah did not recognize same sex marriages. The attorneys for the Tax Commission are in the Attorney General's Office, but the Tax Commission can also receive advice from the governor's counsel.

Deliberation

Ms. Smith-Mansfield made a motion to go in camera to inspect the documents in question. Mr. Rowley seconded the motion. The vote in favor was unanimous.

Closed Session 10:19 a.m. – 10:58 a.m.

Deliberation

Mr. Rowley made a motion to return to open session. Ms. Richardson seconded the motion. The vote in favor was unanimous. The committee returned to open deliberation. Regarding documents numbered 16-42; Mr. Rowley made a motion to disclose them as they did not fall into the category of attorney-client privilege. Ms. Smith-Mansfield seconded the motion. The 2008 SUWA case before the Utah Supreme Court was cited. No confidential information was contained in the documents. The vote in favor of releasing the records was unanimous. Ms. Smith-Mansfield made a motion that numbers 43-48 would require some segregation. The documents contain both public and protected information. The motion was to provide the public information in the records to the petitioner. Mr. Rowley seconded the motion. A discussion followed. The requirements of protected status includes: 1. An attorney-client relationship must be established, 2. The communication must convey confidential information, 3. The communication must be necessary to obtain informed legal advice. The motion was withdrawn. Mr. Hemphill made a motion that documents 43-48 were not properly classified as protected under Utah Code 63G-2-305(17) and should be released. Ms. Richardson seconded the motion. A vote was taken. Ms. Smith-Mansfield voted against the motion. Ms. Cornwall, Mr.

Hemphill, Mr. Misner, Mr. Rowley, and Ms. Richardson voted in favor of the motion. The motion passed five to one. Ms. Cornwall made a motion that the documents numbered 1-15 were classified correctly pursuant to Utah Code 63G-2-305(17) and should not be released. Mr. Misner seconded the motion. A vote in favor of the motion was unanimous. The petitioner had asked the committee to consider release of the protected records in the public interest. After viewing the records, the committee decided not to use the weighing provision. The committee released some of the records as public and upheld the classification of protected for others. Mr. Hemphill said that an order would be sent to the parties in seven days.

Approval of minutes

Ms. Richardson made a motion to approve the minutes of January 9, 2014. Ms. Smith-Mansfield seconded the motion. A vote in favor of the motion was unanimous.

Appeals to SRC

Ms. Mumford distributed a list of appeals made to the State Records Committee since the last meeting. See attached document.

Bills before the legislature

There was a discussion of bills before the legislature. The pertinent bills are: HB 227, HB 242, HB 243, HB 302, SB 36, SB 49, SB 88, SB 114, and SB 169. See attached document.

Cases in District Court

Mr. Tonks presented the cases that were before District Court. He represented the committee to ask for a dismissal of the Firstwest Benefit Solutions, LLC vs. City of Orem appeal of the State Records Committee's order of December 3, 2013. Firstwest Benefit Solutions did not appear before the committee. Morgan Fife was the only petitioner identified in the hearing before the State Records Committee. See the attached list of cases.

Motion to adjourn

Adjournment at 12:50 p.m.

STATE RECORDS COMMITTEE MEETING
February 13, 2014
9:00 a.m.

AGENDA

HEARING

1. **Lee Davidson, Salt Lake Tribune vs. Utah Tax Commission.** Mr. Davidson is appealing the denial of communications regarding policy on joint tax filings for same sex couples in Utah.

BUSINESS

Approval of January 9, 2014 SRC Minutes, action item

Legislative bills that affect GRAMA

SRC appeals received

Cases in District Court

Other Business

ADJOURNMENT

February 2014 Records Committee Case Updates

District Court Cases

Firstwest Benefit Solutions LLC v. Orem City, 4th Judicial District, Utah County, Case No. 140400007, Judge McVey, filed January 2, 2014.

Current Disposition: Answer filed by Committee on January 22, 2014. Orem City did not file an answer but instead filed a Motion to Dismiss based upon Firstwest Benefit Solutions not being a party to the proceedings before the Committee (Morgan Fife was Petitioner). Firstwest Benefit Solutions' Memorandum Contra filed on February 5, 2014, and City's Reply Memorandum filed on February 12, 2014.

Salt Lake City v. Jordan River Restoration Network, 3rd Judicial District, Salt Lake County, Case No. 100910873, Judge Stone, filed June 18, 2010.

Current Disposition: Parties continue forward with filing of discovery requests between each other, with First Set of Discovery Requests filed by both parties on February 10th & 12th.

Appellate Court Cases

Attorney General Office. v. Schroeder, Court of Appeals Case No. 20121057.

Current Disposition: Case has been transferred and certified to the Utah Supreme Court as of January 31, 2014. Appellee (Attorney General Office) appellate brief is due to be filed on March 10, 2014.

Salt Lake City Corp. v. Mark Haik, Court of Appeals Case No. 20130383.

Current Disposition: Briefing has been completed by all parties, waiting to receive an oral argument date.

**SRC Appeals Received
February 2014**

1. **13-32 Salt Lake School District vs. Utah State Auditor's Office.** The District is appealing the denial of copies of complaints against the school district received by the Auditor's Office. This issue resolved and hearing cancelled.
2. **13-47 Lee Davidson, Tribune vs. Utah State Tax Commission.** Mr. Davidson is appealing the denial of records related to policy decisions in same sex marriage filings. Scheduled for February 2014.
3. **14-02 Mark Kimball vs. Utah Department of Corrections.** Mr. Kimball is appealing the denial of a record of inmate co-payment charges. Hearing cancelled.
4. **14-03 Robert Sykes vs. Career Service Review Office.** This issue resolved and hearing cancelled.
5. **14-05 Lynn Packer vs. Attorney General's Office.** Mr. Packer is appealing the partial denial of records of the use of state vehicles. Hearing scheduled for March
6. **14-06 Lynn Packer vs. Department of Administrative Services.** Mr. Packer is appealing the partial denial of information about fleet services and vehicles. Hearing scheduled for March
7. **14-07 Greg Wareham vs. Department of Workforce Services.** Mr. Wareham is requesting billing statements for Medicaid since 2005. Appeal incomplete.
8. **14-07 David Williams vs. Santa Clara, Ivins Public Safety Department.** Mr. Williams is appealing the fee for a copy of a video and audio record from a DUI arrest. This issue resolved before a hearing was scheduled.
9. **14-09 Jessica Phillips vs. West Jordan Police Department.** Ms. Phillips is appealing the denial of an initial contact report including a video and audio record. Hearing scheduled for March 2014.
10. **14-10 Robert O'Connor vs. Uintah County.** Mr. O'Connor is appealing the denial of an initial contact report including a dash camera video record. Hearing cancelled.
11. **14-11 Suzanne Jansen vs. University of Utah.** Ms. Jansen is appealing the partial denial of a request for records related to her termination of employment. Hearing scheduled for March.
12. **14-12 Corey Vonberg vs. Iron County.** Mr. Vonberg is appealing the denial of a record he believes to be maintained by the county. Hearing scheduled for March
13. **14-13 Al Coggeshell vs. UDC.** Mr. Coggeshell is appealing the denial of his mental health records. Hearing denied based on 63G-2-403(4)(b)

14.14-14 Nate Carlisle, Salt Lake Tribune vs. Bluffdale City. Mr. Carlisle is appealing the denial of records from the city and what he considers excessive fees. Hearing scheduled for March.

15.14-15 Wanda Thiel vs. Judicial Conduct Commission. Ms. Thiel is appealing the denial of records resulting from a complaint she made. Hearing to be scheduled for March

Bill	Short Title	Prime Sponsor	Provision
HB227	Request for Legislation Amendments	Powell	Provides that information on a request for legislation form that identifies the name of the legislator submitting the form, the date the form is submitted, and the short title assigned to the requested legislation is public information, even if the legislator requests that the form otherwise remain protected.
HB242	Fees for Government Records Requests	King	Changes may to shall for requests for fee waivers.
HB243	Amendments to the Fund of Funds	Bird	Provides that the Utah Capital Investment Corporation is no longer exempt from the requirements of Title 52, Chapter 4, Open and Public Meetings Act, and Title 63G,
HB302S01	Voting Records Amendments	Perry, L.	Enables those who register to vote to request information be classified as private. Provide the birth date as private.
SB36S01	Voter Information Amendments	Mayne	Limits use of voter information: Permits reuse of voter information permissible only in certain incidences; making reuse for commercial purposes a class B misdemeanor. Must provide identification and assurances of use.
SB49	Parental Permission to Release Student	Valentine	Prohibits release of a student's Personal Identifying Information unless there is parent and student permission
SB88	Child Interview Amendments	Okerlund	Provides that recordings and transcripts of interviews created by the Children's Justice Center are not records
SB114	Canal Safety Act	Davis	Modifies the provision listing what records constitute protected records.
SB169S02	Public Meeting Materials Requirements	Henderson	Defines "electronic information" as presentations delivered during open meeting to be given to the public body (as part of the public record).